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In The

Supreme Court of the United States

October Term, 1992

STATE OF TENNESSEE,

Petitioner,

vs.

DONALD RAY MIDDLEBROOKS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Tennessee

BRIEF OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

In a capital felony murder case, does the Eighth Amendment prohibit the sentencer from relying on a statutory aggravating circumstance that the murder was committed in the perpetration of a felony?

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BRIEF OF PETITIONER

STATEMENT OF THE CASE

A. Procedural History

Donald Ray Middlebrooks was indicted in September, 1987, by the Grand Jury for Davidson County, Tennessee, for the first-degree murder, aggravated kidnapping, armed robbery, and aggravated sexual battery of Kerrick Majors. (R. Vol. of Pleadings, 2-7). On September 19, 1989, Middlebrooks was found guilty of murder in the first degree in the perpetration of a felony, to wit, aggravated kidnapping. TENN. CODE ANN.

§ 39-2-202(a) (1982).[1] He was also found guilty of aggravated kidnapping. TENN. CODE ANN. § 32-2-301 (1982). (R. Vol. of Pleadings, 84). On September 22, 1989, after a sentencing hearing, the jury imposed the death penalty. The jury found that two aggravating circumstances were present: (1) that the murder was heinous, atrocious or cruel in that it involved torture or depravity of mind; and (2) that it was committed while the defendant was engaged in committing a felony. TENN. CODE ANN. § 39-2-203(i)(5) and (7) (1982). The jury further found, as required by the Tennessee statute, that the aggravating circumstances sufficiently outweighed the mitigating circumstances. TENN. CODE ANN. § 39-2-203(g) (1982). (R. Vol. of Pleadings, 94). The trial court sentenced Middlebrooks to 60 years for the aggravated kidnapping. (R. Vol. of Pleadings, 124).

On September 8, 1992, upon automatic, direct review under TENN. CODE ANN. § 39-2-205(a) (1982), the

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[1] TENN. CODE ANN. § 39-2-202(a) provided, at the time of Middlebrooks' conviction, in pertinent part, that a murder "committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb is murder in the first degree".

The Tennessee Legislature amended the statute in 1989 to require recklessness as an element of felony murder. TENN. CODE ANN. § 39-13-202(a)(2) (1991). The Supreme Court of Tennessee expressly stated that its decision would be exactly the same under the pre-1989 or post-1989 version of the statute. *See Middlebrooks*, App. to Cert. petition at A57. Thus, the question raised in this case is not mooted or otherwise rendered unimportant by the 1989 change in Tennessee's felony murder statute.

Supreme Court of Tennessee affirmed Middlebrooks' conviction but remanded the case for resentencing. A three-member majority of the court held that the "duplication" of the elements of felony murder required for the conviction and for application of the felony murder aggravating circumstance violated the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution because the statute as applied in this manner did not sufficiently narrow the class of death-eligible defendants.[2] *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992). The State of Tennessee filed a petition for the writ of certiorari on December 7, 1992. This Court granted the writ on April 19, 1993.[3]

B. Trial and Sentencing

On Sunday, April 26, 1987, around 7:00 p.m., 14-year-old Kerrick Majors, a small boy weighing less than 100 pounds, was with friends in Nashville, Tennessee, when

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[2] While the opinion cites both the federal and state constitutions, this Court has jurisdiction to entertain this matter since it is impossible to conclude that the lower court's decision rested on an adequate and independent state ground. *See Michigan v. Long*, 463 U.S. 1032 (1983). As noted in the petition for certiorari, the opinion relies heavily on the Tennessee Supreme Court's interpretation of this Court's decisions and lacks a plain statement that the result is compelled by state law. *See Middlebrooks*, cert. petition at 13-16. Indeed, it is clear that the Tennessee Supreme Court's holding in this case was compelled by its erroneous interpretation of the Eighth Amendment.

[3] The petition filed by the State was a consolidated petition which also asked the Court to grant certiorari in *Tennessee v. Jonathan Vaughn Evans*. The grant of certiorari was limited to respondent Middlebrooks, however.

they noticed a flea market which had been set up by three homeless persons: Middlebrooks, his wife and Roger Brewington. As the boys approached the flea market, Tammy Middlebrooks called out, "Hey, leave our stuff alone!" The boys started running, chased by Middlebrooks and Brewington. The two men caught Kerrick, and his friends watched as he was dragged into a wooded area. (R. IX, 1320-1325, 1340-1352; X, 1425-1445; XI, 1502).

According to a statement given by Middlebrooks,[4] after they caught the child, he was dragged into a wooded area and the beating and torture began. Brewington slapped the victim, beat him with brass knuckles, hit him with a stick and urinated in his mouth. If the boy flinched, he would be hit again. Middlebrooks and Brewington tied the boy with a rope. Middlebrooks told the child to "be still" because "the dude's going to break your toe". Kerrick pleaded to be let go and said, "All I want to do is go to school and get an education." Brewington responded with profanity. Middlebrooks admitted striking the boy with his open hand and with a switch. Middlebrooks maintained that his wife slapped Kerrick and burned the child's nose with a cigarette lighter. Brewington hit Kerrick on his testicles and threatened to cut "it" open, rammed a stick up the victim's anus, beat the victim and slashed his wrists. Kerrick's eye was bleeding and Brewington would dip a stick in the blood and wipe it on his own head. Brewington also

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[4] The videotape of Middlebrooks' confession was admitted into evidence as Exhibit No. 20 and is included in the appellate record.

licked the victim's bleeding wrist. (R. XI, 1537-1549, 1559-1560).

The beating resulted in numerous abrasions, swellings and bruising on the victim's head, eye, nose, lips and inside his mouth. Kerrick also suffered bruises and skinned areas on his back and had an "X" with a vertical line running through it carved on his chest. These superficial incisions were made while Kerrick was alive. (R. X, 1477-1479; XI, 1641-1642).

Middlebrooks and Brewington, who are white, also repeatedly hurled racial slurs at Kerrick, who was black. Middlebrooks maintained that he told Brewington to "do it" if he was going to do it because the child's crying and begging were getting on his [Middlebrooks's] nerves. Brewington then kissed Kerrick on the forehead, calling it the "kiss of death". Brewington gave Middlebrooks the knife and told him to stab Kerrick. In his confession, Middlebrooks maintained that Brewington stabbed the victim first and that he then got the knife from Brewington and stabbed the child to "prove to Roger that I guess I was cooler" and to put the victim out of his misery. However, Middlebrooks told the arresting officer that he, and not Brewington, stabbed Kerrick both times. (R. XI, 1546-1554, 1522-1528, 1572-1573).

When Kerrick's body was found the next day, there were two deep stab wounds in the center of his body, one of which caused him to bleed to death. He would have lived for a period of ten to twenty minutes after these wounds were inflicted and he would have been conscious for a portion of that time. A blood-stained tee shirt was tied around his neck and there was a belt around his

wrists. The shirt, which had been used as a gag, was wet and smelled strongly of urine. A stick with blood on one end was found lying close to the boy's head. (R. X, 1458-1489; XI, 1638-XII, 1652). The police located the murder weapon, a large locked-blade knife fashioned like a brass knuckle, with blood on the blade. (R. XI, 1505-1508).

The police found and arrested Roger Brewington, who was 16 years old. Brewington implicated Middlebrooks and Middlebrooks's wife, Tammy, in the murder. (R. XI, 150-1512). Middlebrooks was eventually arrested. At the police station, he gave a lengthy videotaped confession. (R. XI, 1510-1522). Although Middlebrooks claimed that he was afraid of Brewington, although he admitted that he never attempted to leave even when he had the knife in his possession. Further, he willingly met Brewington the day after the murder so Brewington could invite him to do what they had done to Kerrick to an entire family. Middlebrooks maintains he declined the offer. (R. XI, 1556-1577).

The victim's ordeal of torture began with his kidnapping at 7:30 p.m. and ended with his death at 11:00 p.m. As the videotape of his confession demonstrates, Middlebrooks demonstrated a cavalier attitude and often smirked while recounting the details of the torture and murder. (R. Ex. 20).

At the sentencing phase of the trial, the State incorporated the evidence adduced at trial and introduced additional evidence regarding Kerrick's injuries, including photographs of his body to establish the extent of torture inflicted on him. (R. XIII, 1803-1819). In an attempt to mitigate his crime, Middlebrooks presented

proof that his father died when he was four years old, that his mother was not home much, and that he "changed" after being raped by a cousin at age eight. He further presented proof that he had been in psychiatric hospitals. (R. XIII, 1827-1946). A clinical psychiatrist testified that Middlebrooks has a borderline personality disorder and that he also suffers from depression, poly-substance abuse, anti-social personality, seizures and malingering, meaning that he has intentionally fabricated or exaggerated symptoms. (R. XIII, 1941-XIV, 1961; XIV, 1968-XV, 2103).

SUMMARY OF ARGUMENT

The sole issue presented in this case is whether Tennessee's statutory felony murder aggravating circumstance satisfies Eighth Amendment requirements by guiding and regularizing the capital sentencer's discretion in selecting murderers on whom the death penalty may be imposed.

The Tennessee Supreme Court erroneously concluded that the felony murder aggravating circumstance fails to perform this constitutional narrowing function. This holding was based on two separate errors in applying the Eighth Amendment narrowing requirement: (1) the court erroneously interpreted the Eighth Amendment to require the aggravator to further narrow a class of murderers that had already been sufficiently identified as being subject to a sentence of death, and (2) the court wrongly insisted that, in the particular context of felony

murder cases, the felony murder aggravating circumstance narrow the class by requiring a mens rea in addition to existing Eighth Amendment proportionality limitations.

The lower court's failure to apply the narrowing requirement to the appropriate class occurred, first, because it failed to address the proper constitutional question under this Court's cases: whether the felony murder aggravating circumstance sufficiently guides the sentencer in narrowing the class of *all death-eligible murderers* (which, in Tennessee is all death-eligible first degree murderers) to that sub-class of murderers for whom the death penalty is particularly appropriate.

If the court had addressed this question, it would have seen that, as applied to the class of all death-eligible *first degree murderers* in Tennessee (a large and diverse class that includes both premeditated "intent" murderers as well as exceptionally heightened culpability felony murderers), the felony murder aggravating circumstance identifies an appropriate sub-class of murderers for whom a sentence of death is constitutionally appropriate.

This Court has already held that the narrowing function need not be performed at the sentencing phase of the trial but may instead be performed at the guilt stage or after trial by a state appellate court (pursuant to a non-vague criterion). Thus, it is totally irrelevant, for constitutional purposes, when and where in a state's overall capital punishment system the constitutional narrowing requirement is satisfied.

Moreover, the sentencer's discretion is guided in a principled and rational manner. The Tennessee legislature

is certainly entitled to conclude that those who commit murder during the course of a serious felony are particularly appropriate for imposition of the death penalty for three reasons: (1) Because they cause more harm to society than non-felony murderers; (2) Because they can be deterred from creating an extreme risk of death to victims by their commission of serious felonies; and (3) Because they often exhibit even greater moral culpability than the average murderer who kills with premeditation, but not in the course of a felony.

The Tennessee Supreme Court also erred by holding that the felony murder aggravating circumstance must narrow the class of felony murderers based upon a higher level of mens rea than that required by Eighth Amendment proportionality standards. This rationale fails to recognize that the narrowing requirement is not an end in and of itself, but has as its purpose the guiding of the jury's discretion in order to ensure rationality, predictability, and particularization in capital sentencing. It is the Legislature's duty to adopt objective standards to inform the capital sentencer and reviewing court of the basis for imposing the death penalty in a particular case. Such a legislative decision is accorded special deference by the Eighth Amendment in the jurisdiction of this Court. To require anything more from a state which has employed proper narrowing procedures with principled criteria for the capital sentencer to follow, results in a novel and unjustifiable Eighth Amendment intrusion into a state's legislative decision.

Tennessee's felony murder aggravating circumstance, as it operates within the context of Tennessee's capital punishment system as a whole, leads to the imposition of the death penalty in a principled and rational manner.

The only persons who can possibly receive the death penalty in Tennessee by means of a felony murder aggravating circumstance are those who exhibit the culpability of a murderer and whose murderous act occurs during the course of an enumerated felony. The end result that is the sole purpose of the narrowing requirement – principled, rational, and particularized death sentencing – is achieved. Nothing more is, or should be, constitutionally required.

Finally, Tennessee's felony murder aggravating circumstance does not violate any other Eighth Amendment requirement since there is no proportionality or vagueness problem presented. The felony murder aggravating circumstance in Tennessee, as applied since this Court's decision in *Tison v. Arizona*, 481 U.S. 137 (1987), complies with this Court's proportionality requirement. Additionally, the aggravating circumstance is clear and unambiguous and thus can pose no vagueness problem.

ARGUMENT

THE EIGHTH AMENDMENT IS NOT VIOLATED WHERE THE SENTENCER IN A CAPITAL FELONY MURDER CASE RELIES ON A STATUTORY AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN THE PERPETRATION OF A FELONY.

A. Tennessee's felony murder aggravating circumstance is a principled criterion which guides the sentencer's discretion in deciding whether the death penalty should be imposed in a particular case.

The sole issue presented in this case is whether Tennessee's felony murder aggravating circumstance sufficiently "guides," "regularizes" and makes "rationally

reviewable" the jury's discretion in narrowing in a principled manner the class of murderers to a sub-class of those who may have the death penalty imposed upon them. *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). The Eighth Amendment requires that an aggravating circumstance serve to ensure that the sentencer's discretion is guided and channeled in order to eliminate "total arbitrariness and capriciousness" in the imposition of a capital sentence. *Proffitt v. Florida*, 428 U.S. 242, 258 (1976). In *McCleskey v. Kemp*, 481 U.S. 279 (1987), this Court explained what a state's death penalty scheme must accomplish in order to satisfy the Eighth Amendment requirement of narrowing:

> [O]ur decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold.

Id. at 305. Consequently, an aggravating circumstance must serve to "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

1. The felony murder aggravating circumstance sufficiently narrows the class of murderers.

There can be no question that the Tennessee felony murder aggravating circumstance adequately narrows the

class of murderers who are eligible for the death penalty (in Tennessee, all first degree murderers) into a smaller subset. The Supreme Court of Tennessee mistakenly concluded otherwise, in part, because it employed as its universe of all murders only felony murders. The court reasoned that since the universe of all murders was felony murders, the aggravating circumstance did nothing to further narrow the class of death-eligible defendants from all defendants who commit felony murder because there were no elements in the aggravating circumstance that were not also present as an element of the offense. This is incorrect for two reasons. First, felony murder is just one means by which the State may prove that an individual has committed murder in the first degree and is potentially eligible for the death penalty. A killing which is "intentional, premeditated and deliberate" or a reckless killing which is the result of discharging an explosive device also constitutes first-degree murder, TENN. CODE ANN. § 39-13-202(a) (1991), and all first degree murders are potentially eligible for the death penalty. TENN. CODE ANN. § 39-13-202(b) (1991). Thus, the universe of death-eligible killers includes not just felony murderers but those who intentionally, premeditatedly and deliberately kill.

Recently, this Court held that "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty the circumstance is constitutionally infirm." *Arave v. Creech*, 507 U.S. at ___, 113 S. Ct. 1534, 1542 (1993) (emphasis in the original). In that case, this Court upheld an aggravating circumstance which, together with the state court's limiting construction, required that the murder was "cold

blooded and pitiless". The Court concluded that this aggravating circumstance adequately narrowed the class of death-eligible defendants since some murderers exhibit "feeling" and are not "cold blooded". Thus, the statute "narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed." *Arave*, 507 U.S. at ___, 113 S. Ct. at 1543. Surely, if the Idaho aggravating circumstance meets the Eighth Amendment narrowing requirement since there are at least some murderers to whom it does not apply, the felony murder aggravating circumstance also complies since there are a substantial number of first degree murderers for whom the felony murder aggravator is inapplicable.

Second, since *Tison*, the Tennessee felony murder aggravating circumstance cannot be used to impose the death penalty even against *all* felony murderers, but *only* against the limited category of felony murderers who are major participants in the crime and act with reckless indifference to the value of human life.[5] Quite clearly, felony murders with such heightened culpability are a subset of all felony murders. For this reason, the aggravating circumstance can be used to impose the death penalty only when the defendant exhibits a mens rea level not present as an element of the crime of felony murder.

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[5] Under the first-degree murder statute at the time Middlebrooks committed his crime, felony murder did not include any heightened mens rea requirement. TENN. CODE ANN. § 39-2-202(a) (1982), and thus the *Tison* standard would have been applied by the Tennessee courts. A 1991 amendment to the first-degree murder statute added "recklessness" as an element of felony murder. TENN. CODE ANN. § 39-13-202(a)(2).

Thus, the felony murder aggravating circumstance substantially narrows the class from the properly defined universe of all murderers, including all traditional "intent" murderers as well as all felony murderers who do not meet the *Tison* standard.

It is important to note that this case does *not* pose any constitutional problem relating to the timing or mechanics of the narrowing process. Even the Supreme Court of Tennessee in its opinion seemed to acknowledge that the timing and mechanics of the narrowing process were constitutionally insignificant; rather, the court's decision was premised on its mistaken belief that Tennessee's use of the felony murder aggravator, in a felony murder case, simply could not adequately perform the required narrowing function. *Middlebrooks*, App. to cert. petition at A62.

In *Lowenfield v. Phelps*, 484 U.S. 231 (1988), the petitioner complained that his death sentence should be set aside because the sole aggravating circumstance was identical to an element of the crime for which he was convicted. The Court found that the petitioner's argument "that the parallel nature of these provisions requires that his sentence be set aside rests on a mistaken premise as to the necessary role of aggravating circumstances." *Id.* at 244. The Court again emphasized that to comply with the Eighth Amendment, a capital sentencing scheme must narrow the class of persons eligible for the death penalty and that aggravating factors are one method to accomplish this narrowing. It does not matter whether the narrowing occurs in the guilt phase, as it did under the Louisiana sentencing scheme involved in *Lowenfield*, or whether it occurs at the sentencing phase.

Similarly, in *Walton v. Arizona*, 497 U.S. 639 (1990), the petitioner argued, *inter alia*, that Arizona's interpretation of the "especially heinous, cruel or depraved" aggravating circumstance failed to adequately channel the sentencer's discretion. This Court explained that trial judges (who are responsible for Arizona death sentencing) can be presumed to follow any non-vague narrowing construction that has been declared by the Arizona Supreme Court. The Court added, however, that:

> [E]ven if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, . . . a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined . . .

Id. at 653-4. In other words, the *Walton* court held that any non-vague narrowing criteria, such as an aggravating circumstance, can be applied by a state appellate court and satisfy the Eighth Amendment. *Compare Maynard v. Cartwright*, 486 U.S. 356 (1988) (appellate court cannot perform narrowing function pursuant to a vague aggravating circumstance.) This is consistent with this Court's Eighth Amendment proportionality cases. *See Tison*, 481 U.S. at 143-5 (application of *Tison* felony murder culpability standard can be based on facts found by state appellate court); *Cabana v. Bullock*, 474 U.S. 376, 392 (1986) (state appellate court can properly decide whether the *Enmund v. Florida*, 458 U.S. 782 (1982), felony murder culpability standard is met).

Thus, under *Lowenfield* and *Walton*, the narrowing function required by the Eighth Amendment in death penalty cases may properly be performed by a jury, a trial judge, or an appellate court, so long as the narrowing criteria is not unconstitutionally vague. In light of this Court's rulings in *Lowenfield* and *Walton*, it is not surprising that the Supreme Court of Tennessee's opinion did not focus on the particular timing or mechanics of the narrowing function. Such purely procedural or technical matters are constitutionally insignificant so long as the required narrowing takes place at some point. Rather, the decision of the lower court was premised upon its mistaken belief that Tennessee's use of the felony murder aggravating circumstance, in a felony murder case, simply could not adequately perform the required narrowing function.

2. The felony murder aggravating circumstance narrows the class of murderers in a principled manner.

The felony murder aggravator serves to identify a class of murderers for whom imposition of the death penalty is a principled legislative choice for three reasons. First, a defendant who not only murders but in addition commits another serious felony has caused greater harm to society than an individual who murders but commits no additional crime. Courts have always taken into consideration the harm caused by the defendant in imposing sentence. It is entirely legitimate for Tennessee to permit the jury to consider all of the harm caused by the defendant in assessing his personal responsibility. *Payne v. Tennessee*, 501 U.S. ___, 111 S.Ct. 2597 (1991). The commission of a statutorily designated felony

in addition to the murder creates additional harm to society and it is therefore a principled penological decision to address this concern in the form of a felony murder aggravating circumstance.

Second, society has a legitimate need to deter the commission of particularly reckless felonies which may result in murder. The felony murder aggravating circumstance serves this purpose. "[This Court has] recognized that society has important and legitimate interests in retribution *and deterrence*, and that these interests provide the necessary justification for imposing the death penalty." *Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring) (emphasis added).

Although this Court in *Enmund* found that the death penalty could not deter murder in the felony murder context because no premeditation or deliberation takes place with respect to the killing, *Enmund*, 458 U.S. at 799, that concern clearly pre-dates *Tison*. As a result of the decision in *Tison*, a felony murder defendant may not receive the death penalty unless he was a major participant in the underlying felony and acted with reckless indifference to the value of human life. In order to meet the *Tison* recklessness test, the defendant must act with conscious awareness that his actions create an extreme threat to human life; merely negligent creation of risk of death will not suffice.[6] Such a person must make a

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[6] Section 2.02 of the Model Penal Code defines recklessness as when an individual "consciously disregards a substantial and unjustifiable risk that the material element [of the offense] exists or will result from his conduct. . . . " MODEL PENAL CODE § 202(1)(c) (Proposed Official Draft 1962).

conscious, intentional decision to commit the underlying felony despite the known risk to human life.

It is perfectly reasonable for the Tennessee Legislature to conclude that the death penalty will have a similar deterrent effect on post-*Tison* felony murderers as it does on traditional intent murderers. Under *Tison*, the threat of the death penalty may well deter such persons from continuing in their reckless course of conduct or, at the very least, lead them to take special steps to prevent unintended killings. Thus, deterrence provides a principled legislative basis for the felony murder aggravating circumstance to which this Court should extend special deference since "[t]he value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with legislatures. . . . " *Gregg v. Georgia*, 428 U.S. 153, 186-187 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

Tennessee's felony murder aggravating circumstance also narrows the class of murderers based upon their personal responsibility and moral guilt. Under this Court's decisions in *Tison* and *Enmund*, only those murderers who killed, intended to kill or acted with reckless indifference to the possibility that the victim would in fact die, may receive the death penalty. In *Tison*, this Court noted that "the common law and modern criminal codes alike have classified [such behavior] along with intentional murders."[7] *Id.* at 157. Thus, the *Tison*

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[7] The *Tison* culpability standard of "reckless indifference to the value of human life" is for death penalty purposes the functional equivalent of what the Model Penal Code calls acting "recklessly under circumstances manifesting extreme indifference to the value of human life," MODEL PENAL CODE § 210.2(b)) and what many state murder statutes call "extreme recklessness" sufficient to impose murder liability, even in the absence of an accompanying felony. In fact, at least 34 states would treat at least some defendants who meet a *Tison*-type standard of heightened recklessness but who have not committed felony murder as "murderers". *See* Appendix.

culpability standard means that, in order to be constitutionally death-eligible, a felony murder defendant must at least approach, if not exceed, the personal moral culpability of traditional first degree murder with respect to the victim's death. This heightened level of culpability, *for the victim's death itself*, is a constitutionally significant factor that is analytically distinct from the fact that a felony murder defendant may also have committed an extremely serious felony. Although the Court noted in *Tison* that the commission of certain felonies may suffice, either categorically or in particular cases, as persuasive evidence of the existence of "reckless indifference to the value of human life," an individual felony murder defendant's personal guilt and moral culpability with respect to the victim's death nevertheless remains a separate constitutional requirement.

Thus, after *Enmund* and *Tison*, if an individual felony murder defendant does not possess heightened personal moral culpability for the victim's death at the level of at least "reckless indifference to the value of human life," then the death penalty is a disproportionate punishment that cannot be imposed on the defendant. Given this existing constitutional limitation on the imposition of the death penalty for all felony murder cases, the presence of the felony murder aggravator serves exactly the same

purpose in all post-*Tison* felony murder cases as it serves in traditional first degree murder cases. That is, the presence of the felony murder aggravating circumstance reflects the state's decision that the defendant is among those for whom death is an appropriate punishment because such a defendant *not only* exhibited a heightened personal moral culpability with respect to the victim's death (either "premeditated intent to kill" for traditional first degree murder, or "reckless indifference to the value of human life," for post-*Tison* felony murders), *but also* possessed that heightened culpability in connection with the intentional commission of an extremely serious felony.

The fact that a murderer has committed a serious felony in addition to the murder suggests that he has not acted in an aberrational way in committing murder; thus, imposition of the death penalty is particularly appropriate. This Court has said that a defendant's past criminal conduct is "indicative of his probable future behavior". *Skipper*, 476 U.S. at 5. This common sense proposition is true precisely because a person who commits a criminal offense is likely to commit another. Similarly, the commission of a serious felony in addition to murder is indicative of the character of the defendant.

Indeed, in many cases the commission of an intentional, serious felony coupled with heightened recklessness with respect to the death of the victim, represents greater moral culpability than even premeditated intentional murder. An individual who commits premeditated murder, though criminally culpable, may well have been responding emotionally or acting in the heat of anger, even if there was insufficient provocation to make the

crime manslaughter. For example, in *Godfrey v. Georgia*, 446 U.S. 420 (1980), the defendant killed with intent and premeditation as a result of a domestic dispute. This Court was unable to find Godfrey's crime, though premeditated, to be any more serious than other murders.

On the other hand, a person who not only commits murder but, for example, intentionally steals money from his victim or intentionally rapes before killing displays greater moral depravity, deserving of the ultimate punishment. As this Court recognized in *Tison*:

> A narrow focus on the question of whether or not a given defendant "intended to kill", however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. Many who intend to, and do, kill are not criminally liable at all – those who act in self-defense or with other justification or excuse. Other intentional homicides, though criminal, are often felt undeserving of the death penalty – those that are the result of provocation. On the other hand, some nonintentional murderers may be among the most dangerous and inhumane of all – the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of a robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as "intent to kill".

Tison, 481 U.S. at 157.

Thus, creating an aggravating circumstance based on the commission of an additional felony is a perfectly principled legislative choice that is consistent with the defendant's culpability.

B. Tennessee's capital sentencing scheme as a whole ensures compliance with the Eighth Amendment.

The Supreme Court of Tennessee erred in looking only at the single aggravating circumstance of felony murder in determining whether there was sufficient narrowing to satisfy the federal constitution. Aggravating factors are but one portion of the sentencing scheme. The system must be examined as a whole when evaluating whether it is constitutionally adequate. Tennessee's statute includes several other safeguards which help to channel the sentencer's discretion. A bifurcated proceeding is mandated, as is appellate review. TENN. CODE ANN. §§ 39-13-204(a); 39-13-206 (1991). In determining that Georgia's statutory scheme was constitutionally permissible, this Court found these two factors to be "important features . . . that would guide and channel the exercise of discretion." *Zant*, 462 U.S. at 875. Additionally, Tennessee's statute requires that the jury consider mitigating circumstances and specifically directs the way in which the jury is to weigh the aggravating factors and the mitigating factors. TENN. CODE ANN. § 39-13-204(e) and (f) (1991). All of these statutory safeguards work together to ensure that the jury is not given unfettered discretion but rather that its discretion is adequately channeled in the selection phase.

The Supreme Court of Tennessee clearly appreciates and fulfills its statutory duty to conduct a proportionality review on the death penalty cases which come before it. In this case, the Supreme Court of Tennessee indicated quite emphatically that the court would continue to conduct a proportionality review in capital cases "to assure that the sentence *in each case* is not disproportionate or excessive." *Middlebrooks*, App. to cert. petition at A45; (emphasis in original).[8]

Under any capital sentencing scheme, one might be able to imagine a hypothetical fact pattern which, while falling under the purview of a particular aggravating circumstance, would not necessarily identify a defendant who deserves the death penalty more than other murderers. However, that would not render such a capital sentencing scheme unconstitutional. Indeed, it is precisely for this reason that this Court has insisted on individualized mitigating circumstances. *Sumner v. Shuman*, 483 U.S. 66 (1987); *Lockett v. Ohio*, 438 U.S. 586 (1978). Rather, the question is whether the sentencing scheme *as a whole* ensures that the imposition of the death penalty is not wanton and freakish and that there is a reasonable basis for imposing the death penalty on those defendants who receive it as compared to those death-eligible defendants who receive a sentence of life

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[8] That the Supreme Court of Tennessee fulfills its statutory duty to review the proportionality of death sentences was recently demonstrated by its decision to set aside a sentence of death in a felony murder case based, in part, upon a finding that the *Tison* "heightened recklessness" standard had not been met. *State v. Branam*, No. 03502-9103, 1993 WL 173632 (Tenn. May 24, 1993).

imprisonment. Similarly, an aggravating circumstance which is facially valid and meets all constitutional requirements will not be invalidated simply because it may have been improperly applied in an isolated, individual case. *Arave*, 507 U.S. at ___, 113 S. Ct. at 1544 (1993). As this Court said in *Pulley v. Harris*, 465 U.S. 37, 54 (1984):

> Any capital sentencing scheme may occasionally produce aberrational outcomes. Such inconsistencies are a far cry from the major systematic defects identified in *Furman*. As we have acknowledged in the past, "there can be no 'perfect procedure for deciding in which cases governmental authority should be used to impose death.' " *Zant v. Stephens*, 462 U.S. at 884, 103 S.Ct. at 2747-2748, *quoting Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) (plurality opinion).

The death penalty in this case was imposed by a jury which fully considered the nature and circumstances of the crime, the aggravating circumstances, and the proof which Middlebrooks offered in mitigation. There can be no question that death is a proportional punishment for the crime Middlebrooks committed and that imposition of the death penalty in accordance with Tennessee's statutory scheme was neither "wanton" nor "freakish". *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

C. This case does not present an issue of proportionality because the use of the felony murder aggravating circumstance does not violate the Eighth Amendment proportionality requirement.

No proportionality problem is presented in this case because the felony murder aggravating circumstance as applied in Tennessee since this Court's decision in *Tison* fully meets Eighth Amendment proportionality requirements. As the Court recognized in *Tison*, "substantial and recent legislative authorization of the death penalty for the crime of felony murder regardless of the absence of a finding of intent to kill powerfully suggests that our society does *not* reject the death penalty as grossly excessive under the circumstances." *Tison*, 481 U.S. at 154 (citations omitted) (emphasis in the original). This Court concluded that the death penalty was a proportional punishment for felony murderers so long as the defendant was a "major participant" in the underlying felony and exhibited with respect to the killing at least "reckless indifference to the value of human life". *Id.* at 158.

Tennessee's statute meets this constitutional mandate whether or not a felony murder aggravating circumstance is employed. The Supreme Court of Tennessee correctly found that the State's statutory scheme complies with the proportionality standard for felony murder set out in *Tison*. However, rather than concluding that, as a result, Tennessee's statute necessarily meets the proportionality requirement as defined in that case, the court instead erroneously concluded that the class had to be further "narrowed" into an even smaller subset based on the defendant's mens rea; and, since this was not done, the court found that the statutory scheme failed to satisfy the Eighth Amendment's requirements. *Middlebrooks*, App. to

cert. petition at A59. This conclusion is in error since, once the *Tison* standard is met, the Eighth Amendment's proportionality mandate has been fully satisfied and the question then becomes whether the aggravating circumstance sufficiently narrows the class of murderers in a principled manner. *See* argument A, *supra*.

Finally, Middlebrooks never claimed in state court that death was a disproportionate punishment for the crime he committed. The failure to make such a claim is understandable given the evidence in this case. Middlebrooks confessed that he was present as 14-year-old Kerrick Majors was tortured over a three and one-half hour period, that he slapped the child and hit him with a "switch," that he watched as his partner in crime brutally beat the child and tortured him, that he told his partner to "do it", meaning "kill the boy," because the child's begging was getting on Middlebrooks' nerves, and finally that he administered at least one of the fatal stab wounds (and perhaps both) to prove that he was "cooler" than his partner. Obviously, no reasonable person can contend that a sentence of death is disproportionate for Middlebrooks' crime.

D. This case does not present a "vagueness" problem because the felony murder aggravating circumstance is clear and unambiguous.

In *Furman*, this Court held that for a capital sentencing scheme to be constitutional, the sentencer's discretion must be directed, limited and exercised in an informed matter so as to avoid the arbitrary and capricious imposition of the death penalty. To satisfy this requirement, the statute must "channel the sentencer's discretion by 'clear

and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' " *Godfrey*, 446 U.S. at 428 (footnote omitted). Thus, a federal court when reviewing the constitutionality of an aggravator must first determine if it is "too vague to provide any guidance to the sentencer." *Walton*, 497 U.S. at 654.

Clearly, an aggravating circumstance which requires that the murder have been committed during the course of an enumerated felony is not vague. The jury is unambiguously informed that the circumstance may be found if a murder was committed during the course of a specifically enumerated felony. Such a well-defined aggravator adequately channels the sentencer's discretion. Thus, this aggravator fully satisfies this constitutional requirement and vagueness is not an issue presented in this case.

E. This Court should reject the creation of a new Eighth Amendment requirement.

Tennessee's use of the felony murder aggravating circumstance in the context of this Court's decisions in *Enmund* and *Tison* fully complies with each and every requirement under the Eighth Amendment that has been mandated by this Court. It is not vague, it does not result in the imposition of the death penalty where such a result would be disproportionate for the offense, and it meaningfully narrows the class of death-eligible defendants in a principled manner.

The Supreme Court of Tennessee created a novel requirement that the felony murder aggravating circumstance further narrow the set of all felony murderers who

meet the *Tison* proportionality standard into an even smaller subset of felony murderers on the basis of a heightened mens rea. The lower court's conclusion that "[s]ince the absence of reckless indifference constitutionally immunizes a defendant from the death penalty, its presence cannot meaningfully further narrow the class of death-eligible defendants," (*Middlebrooks*, App. to cert. petition at A63), not only confuses the separate and distinct requirements of narrowing and proportionality but, if adopted, would do substantial harm to Eighth Amendment jurisprudence. The lower court's rationale could apply equally to other aggravating circumstances. Under the court's reasoning, whenever this Court decides to recognize a new minimum standard for proportional punishment under the Eighth Amendment, states that already comply with that proportionality standard must then amend their statutes and further narrow the class into an even smaller subset in order to "meaningfully further narrow the class of death-eligible defendants".

Such a requirement is unnecessary because the current guidelines set out by this Court are adequate to ensure that the death penalty is imposed in a constitutional manner. Further, such a requirement would produce a never-ending spiral of "narrowing" until imposition of the death penalty would be virtually impossible.

CONCLUSION

The judgment of the Supreme Court of Tennessee should be reversed.

Respectfully submitted,

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APPENDIX

The following states permit convictions for at least some types of murder based upon extreme recklessness or something akin to it:

STATE	CODE SECTION
Alabama	ALA. CODE § 13A-6-2(a)(2) (1982)
Alaska	ALASKA STAT. § 11.41.110(a)(2) (1989) (1992 Supp.)
Arizona	ARIZ. REV. STAT. ANN. § 13-1104(A)(3) (1989)
Arkansas	ARK. CODE ANN. § 5-10-101(a)(9) (Michie 1987) (1991 Supp.)
California	CAL. PENAL CODE § 188; 189 (West 1988) (1993 Supp.)
Colorado	COLO. REV. STAT. § 18-3-102(1)(d) (1986)
Delaware	DEL. CODE ANN. tit. 11, § 635(1) (1987) (1992 Supp.)
Florida	FLA. STAT. ANN. § 782.04(2) (West 1992)
Georgia	GA. CODE ANN. § 16-5-1(b) (Michie 1992)
Idaho	IDAHO CODE § 18-4001; 4002 (1987)
Illinois	ILL. ANN. STAT. ch. 38, ¶ 9-1(2) (Smith-Hurd 1979) (1992 Supp.)
Kansas	KAN. STAT. ANN. § 21-3402 (1988) (effective July 1, 1993) (1993 Kan. Sess. Laws 423)

Kentucky	KY. REV. STAT. ANN. § 507.020(1)(b) (Michie 1990)
Maine	ME. REV. STAT. ANN. tit. 17-A, § 201(1)(B) (West 1983)
Maryland	MD. CRIMES AND PUNISHMENTS CODE ANN. § 411 (1992)
Massachusetts	MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1990)
Michigan	MICH. COMP. LAWS ANN. § 750.317 (West 1991)
Minnesota	MINN. STAT. ANN. § 609.195(a) (West 1987) (1993 Supp.)
Mississippi	MISS. CODE ANN. § 97-3-19(1)(b) (1973)
Nevada	NEV. REV. STAT. § 200.030(2); 200.020(2) (1991)
New Hampshire	N.H. REV. STAT. ANN. § 630:1-b (1986)
New Mexico	N.M. STAT. ANN. § 30-2-1(A)(3) (Michie 1991)
New York	N.Y. PENAL LAW § 125.25(2) (McKinney 1987)
North Carolina	N.C. GEN. STAT. § 14-17 (1991)
North Dakota	N.D. CENT. CODE § 12.1-16-01(1)(b) (1985)
Oklahoma	OKLA. STAT. ANN. tit. 21, § 701.8 (West 1983)
Pennsylvania	18 PA. CONS. STAT. ANN. § 2502 (1983)
Rhode Island	R.I. GEN. LAWS § 11-23-1 (1981) (1992 Supp.)

South Carolina	S.C. CODE ANN. § 16-3-10 (Law. Co-op 1985)
Tennessee	TENN. CODE ANN. § 39-13-210(2) (1991)
Utah	UTAH CODE ANN. § 76-5-202 & 203 (1990) (1992 Supp.)
Washington	WASH. REV. CODE § 9A 32.030(1)(b) (West 1988) (1993 Supp.)
West Virginia	W. VA. CODE § 61-2-1 (1992)
Wisconsin	WIS. STAT. ANN. § 940.02 (West 1982) (1992 Supp.)